

June 19, 2006

Civil Division-Kent County (739-7641)

Mr. Robert G. Ritter
606 North State Street
Dover, DE 19901

Re: **Freedom of Information Act Complaint
Against City of Dover**

Dear Mr. Ritter:

On May 4, 2006, our Office received your complaint alleging that the City of Dover ("the City") violated the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"), by meeting in executive session on February 24, 2006 to interview candidates for the position of Director of Planning and Inspections. You "question whether names of people, employees, or their position/title, as being interviewed for a public position and/or the interviews of this position fall under executive session Guidelines." You also allege that the City violated your First Amendment right of free speech by censuring you on March 13, 2006 for statements you made at a public meeting on February 27, 2006 criticizing the City Council.

By letter dated May 9, 2006, we asked the City to respond to your complaint in writing within ten days. We received the City's response on May 18, 2006. On May 31, 2006, we asked the City for copies of the notice, agenda, and minutes of the February 24, 2006 executive session of the City Council, which we received that same day.

The City noticed a special meeting of the Council for February 24, 2006. Listed on the agenda for that meeting were: "Executive Session – Personnel Matters A. Final Interviews – Candidates for Director of Planning and Inspections. B. Retitling and Regrading of Positions – Discussion of Abilities of Incumbents." The City provided us with a copy of the minutes of the February 24, 2006 executive session for our *in camera* review.

According to the minutes, one of the three final candidates for Director of Planning and Inspections withdrew his name from consideration. The Council interviewed the two remaining candidates. After the interviews, " Council President Williams asked each member to relay their choice of candidate for the position, which indicated that there were six (6) in favor of offering the position to [Candidate A] and three (3) in favor of offering the position to [Candidate B]." The minutes then reflect that "[s]ince a majority of the members felt that [Candidate A] should be offered the position, Mr. DePrima stated that he would contact [Candidate A] to negotiate a salary, within budget, . . . Official action on the appointment would be scheduled for the Regular Council Meeting on February 27, 2006." ¹

¹ Mr. DePrima is a staff member of the City Council. To protect the privacy of the unsuccessful candidate, we have assigned code names (Candidate A and Candidate B) to the two finalists for purposes of this opinion.

The minutes of the February 24, 2006 executive session show that the Council also discussed the reorganization of the Planning and Inspections Department and the qualifications of two city employees to assume the new positions of Public Services Manager and Public Utilities Manager. After that discussion, the minutes show "that official action regarding the retitling and regrading of the Electric and Public Works positions is scheduled for the Regular Council Meeting on February 27, 2006."

Item 9 of the agenda for the Council's February 27, 2006 meeting listed for discussion: "Retitling and Re-grading of Current Electric Director and Public Works Director Positions." The minutes reflect that during that portion of the agenda, you made the following remarks:

[Mr. Ritter] stated that he could not support the action because the Public Works Director would be in charge of the Planning Department, and that person does not have those specific qualifications. Mr. Ritter stated that the Public Works Director applied for the position of the City Planning Director, but backed out because this new position would put him over the Planning Director. . . . The two new positions will be making just about \$93,300 after the upward movement. Mr. Ritter suggested that other cuts could be made without reorganizing and that the city should not create new positions for the sake of creating new positions or who has been promised what. The inequity of the hiring process is not ethically right and does not satisfy the equal employment opportunity. Mr. Ritter states that this gives the impression of special treatment and preference given to friends or colleagues; therefore, he could not support the action.

The minutes show that the Council voted to approve the two new positions "by a roll call vote of eight (8) yes and one (1) no (Mr. Ritter)."

Item 10 of the agenda for the Council's February 27, 2006 meeting listed for discussion:

"Appointment of Director of Planning and Inspections." The minutes of the meeting show that you made the following remarks during that portion of the agenda:

The hiring process was flawed because we had one Councilman giving tips to a candidate that was being interviewed. We have also changed the position of the Director of Planning while in the middle of the interviewing process, so this position we advertised will not be the same as the position we are hiring for now. . . [T]he process has been severely flawed and tainted during this round of applicants. This position should be re-advertised with a new job description so that the City does not give the appearance of giving people in the "buddy system" favors.

The minutes show that after further discussion Councilman Hogan "moved to appoint Ann Marie Townsend to serve as Director of Planning and Inspections at a salary of \$73,000, beginning March 20, 2006. The motion was seconded by Mr. Carey. The motion . . . carried by a roll call vote of eight (8) yes, one no (Mr. Ritter)."

The City noticed a regular meeting of the Council for March 13, 2006. Item 10 of the agenda for that meeting listed: "Proposed Resolution – Censure of Councilman Robert G. Ritter." The minutes of the March 13, 2006 meeting show that the Council voted 8-1 to adopt a resolution to censure you "for violating the spirit and purpose of the Executive Session held on February 24, 2006, by referring to facts which should have been and remained confidential and should not have been divulged to the public by Councilman Ritter." Specifically, the censure resolution cited statements you made at the public meeting on February 27, 2006 "pertaining to the identity and qualifications of applicants."

RELEVANT STATUTES

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" for executive session for a purpose authorized by statute. 29 *Del. C.* §10004(a).

FOIA authorizes a public body to meet in executive session to discuss "an individual citizen's qualifications to hold a job or pursue training unless the citizen requests that such a meeting be open." *Id.* §10004(b)(1).

"Executive sessions may be held only for the discussion of public business, and all voting on public business must take place at a public meeting and the results of the vote made public." *Id.* §10004(c).

LEGAL ANALYSIS

A. February 24, 2006 Executive Session

FOIA authorizes a public body to meet in executive session to discuss an applicant's "qualifications to hold a job." 29 *Del. C.* §10004(b)(1). In *Att'y Gen. Op.* 99-IB03 (Apr. 28, 1999), our Office determined that the town council lawfully met in executive session to discuss the hiring of a new town manager. "For sound policy reasons, job applicants have a right of privacy to information disclosed during the application process, at least until they are hired." *Id.*

In *Att'y Gen. Op.* 05-IB12 (May 9, 2005), the county council met in executive session to interview and discuss the qualifications of two finalists for the position of legal counsel. Our Office determined that the council did not violate the open meeting requirements of FOIA because "the two applicants had a reasonable expectation of privacy until such time as the Council voted to hire one of them and extend an offer of employment." *Att'y Gen. Op.* 05-IB12. "For privacy reasons, FOIA does not require a public body to identify by name in the agenda the candidates for a job whose

qualifications can lawfully be discussed in executive session. By the same rationale, we determine that FOIA does not require, in the case of a new job applicant, that the public body disclose the name of the individual candidates at the time of the vote in public session. When the job offer is extended and accepted, the name of the job applicant necessarily will become public, and the public will know, from the minutes, which members of the public body voted to hire that applicant." *Id.*

In *Att'y Gen. Op.* 05-IB12, the county council returned to public session before voting on the two candidates (using code names to protect their privacy). Here, in contrast, the City Council reached a consensus vote in executive session (6-3) in favor of one of the two finalists for the Director of Planning and Inspections. Our Office has previously determined that "'FOIA does not permit 'straw polling' nor does FOIA 'allow public bodies to reach 'consensus votes'" during executive session. *Att'y Gen. Op.* 05-IB29 (Oct. 13, 2005) (quoting *Att'y Gen. Op.* 96-IB15 (May 10, 1996)). See *Att'y Gen. Op.* 96-IB32 (Oct. 10, 1996) ("consensus votes in executive session are prohibited").

The minutes of the February 24, 2006 meeting show that after voting on the two finalists for Director of Planning and Inspections the Council discussed personnel matters that FOIA authorized for executive session. After moving out of executive session, the Council voted to adjourn the meeting. The Council did not vote in public session on the two final candidates for the Director of Planning and Inspections before adjourning the February 24, 2006 meeting.²

² It is unclear from the minutes of the February 24, 2006 meeting whether the Council voted in public session to go into executive session as required by FOIA. "If a public body meets to discuss only matters that are authorized for executive session, . . . the public still "have a right to attend the opening of the meeting, to see that the public body follows the required procedures for going into executive session, and to observe the discussion of any public business that follows." *Att'y Gen. Op.* 02-IB17 (Aug. 6, 2002). See *Att'y Gen. Op.* 02-IB33 (Dec. 23, 2002) ("FOIA does not permit a 'stand alone' executive session").

FOIA provides that "[e]xecutive sessions may be held only for the discussion of public business, and all voting on public business must take place at a public meeting and the results of the vote made public." 29 *Del. C.* §10004(c). We determine that the City Council violated the open meeting requirements of FOIA at the February 24, 2006 meeting by voting in private on the two finalists for Director of Planning and Inspections. The Council had a legitimate reason to maintain the privacy of the two candidates until the successful candidate accepted an offer of employment. *See Att'y Gen. Op.* 05-IB12. The Council, however, could have maintained their privacy by using code names while voting on the two candidates in public session as required by FOIA.

B. March 13, 2006 Censure

Our Office has "determined that there is a nexus between the procedural requirements of the open meeting laws, and the First Amendment right of free speech." *Att'y Gen. Op.* 05-IB01 (Jan. 3, 2005). FOIA does not require a public body to allow citizens to comment at a public meeting, but "[i]f a public body chooses to allow public participation in a meeting' it cannot discriminate on the basis of the content of the speech . . . First Amendment rights of free speech 'inhere in the definition of an 'open meeting' under Delaware's FOIA when a public body allows for a period of public participation.'" *Att'y Gen. Op.* 05-IB01 (quoting *Att'y Gen. Op.* 03-IB06 (rev. Feb. 11, 2003)). *Accord Reeder v. Department of Insurance*, C.A. No. 1553-N, Mem. Op. at 27, 2006 WL 510067 (Feb. 24, 2006) (Strine, V.C.) ("If a public body seeks comments, . . . the First Amendment might preclude the body from choosing to hear comments only from certain citizens, and not others, depending on the reason given for the distinction drawn.").

"Under the proper circumstances, we believe our Office has authority to interpret the open

meeting requirements of FOIA by taking into consideration a citizen's First Amendment rights of free speech when a public body is required by the open meeting law to notice a meeting to the public thereby creating a limited public forum for discussion of matters of public business noticed in the agenda." *Att'y Gen. Op.* 05-IB01 (Jan. 3, 2005). In *Att'y Gen. Op.* 05-IB01, our Office determined that the school board violated the open meeting requirements of FOIA by imposing prior restraints on what citizens could discuss during a public commentary portion of the meeting.

At the Council's February 27, 2006 meeting, you spoke at length criticizing the process by which the Council selected the Director of Planning and Inspections and the reorganization to create the new positions of Public Utilities Manager and Public Services Manager. The Council did not abridge or restrict the content of the statements you made criticizing the other members of the Council. A constitutional violation, however, "may arise from the deterrent, or 'chilling effect' of governmental resolutions that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972).

In *Phelan v. Laramie County Community College Board of Trustees*, 235 F.2d 1243, 1247 (10th Cir. 2000), *cert. denied*, 532 U.S. 1020 (2001), the board of trustees censured one of its members for violating the board's ethics policy. The federal appeals court held "the Board's censure is clearly not a penalty that infringes Ms. Phelan's free speech rights. In censuring Mr. Phelan, Board members sought only to voice their opinion that she violated the ethics policy and to ask that she not engage in similar conduct in the future. Their statement carried no penalties; it did not prevent her from performing her official duties or restrict her opportunities to speak, such as her right as a Board member, her ability to speak before the Board, or her ability to speak to the public." 235

F.3d at 1248.

"Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird*, 408 U.S. at 13-14. The City Council's March 13, 2006 censure of you did not carry any penalty. There is no evidence in the record that it prevented you from performing your official duties as a member of the Council, or restricted your opportunities to speak before the Council or the public. You have not provided any evidence that the Council's censure had such a chilling effect on you have not been able to speak out about other matters of public business at Council meetings.

We determine that the other members of the City Council did not violate the open meeting requirements of FOIA by expressing their own views – in the form of a censure – in response to statements you made at the February 27, 2006 meeting. "Although the government may not restrict, or infringe, an individual's free speech rights, it may interject its own voice into public discourse." *Phelan*, 235 F.3d at 1247. A legislative body "does not violate the First Amendment when some members cast votes in opposition to other members." *Zilich v. Longo*, 34 F.3d 359, 364 (6th Cir. 1994) (resolution by the city council expressing disapproval of a former council member "contains no punishment or penalty" and therefore does not "violate plaintiff's First Amendment rights").

CONCLUSION

For the foregoing reasons, we determine that the City did not violate the Freedom of Information Act by meeting in executive session on February 24, 2006 to interview two candidates and discuss their qualifications for Director of Planning and Inspections. We determine that the City violated FOIA by voting during that executive session to appoint one of the two candidates to the position subject to salary negotiation. We do not direct any remediation for that violation because the Council noticed the issue for discussion at the February 27, 2006 meeting and voted in public to appoint Ann Marie Townsend as the Director of Planning and Inspections.

We determine that the City Council did not violate the open meeting requirements of FOIA by resolving to censure you at the March 13, 2006 meeting. There is no evidence in the record that the censure had an actual chilling effect on your right to speak at public meetings as a member of the City Council.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

cc: The Honorable Carl C. Danberg

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